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Legal Aspects of Bid Procedure in the Awarding of School Contracts

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LEGAL ASPECTS OF BID PROCEDURE IN THE AWARDING OF SCHOOL CONTRACTS

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CHAPTER I

INTRODUCTION

Purpose of Study. The economical use of school funds raised by taxation is quite essential for the welfare of our country. There has been considerable waste of funds in the past through carelessness, corruptness, and lack of information concerning our statutes prescribing the procedure of spending public funds.

It is the purpose of this study to bring together all the information obtainable on the subject of awarding school contracts by the procedure of advertising for bids as prescribed in the state statutes of the several states and the Supreme Court decisions relating to the bids, so all who are interested may secure under one cover the collection of information gathered from many sources.

Nature of Study and Limitations. This study does not deal with that phase of advertising for the sale of bonds or certificates of indebtedness. It is intended to treat only those contracts calling for services or materials such as, building or construction contracts, contracts for repairing, improving, furnishings, equipment, supplies, textbooks, busses and fuel.

Procedure. The information contained herein has been gathered from the sources listed in the bibliography, which includes the general school statutes and supplement from all

of the states of the United States, the three editions of the American Digest, the seven District Reporters, miscellaneous state reports, and law encyclopedias. Court cases found in the above list were briefed and used as the basis for summarizing and illustrating in this study.[1]

Other Studies on Bids. In a thesis "Judicial Decisions Relating to Contractual Powers of School Boards," by James Wilfred Smith, at the University of Chicago. Chapter II has referred to five of the Supreme Court decisions on the bid procedure of awarding contracts that are incorporated in this study. He has given a general discussion of this phase of contracts insofar as there is a relationship, but he did not attempt to go into details.

Arthur E. Traxler has an article "The Law Governing The Making of Contracts for the Construction of School Buildings,"[2] presenting the court decisions relating to the most important controversial issues, restricting his discussion to construction of buildings only. He has cited twenty supreme court cases of the ninety-five referred to in the bibliography of this study. Traxler merely gave a brief summary of the general rules and regulations applicable to contracts for architects' services, letting contract when sealed proposals are required, bidding on indefinite specifications, contracts

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[1] Key Number 80(2). in American Digest

[2] American School Board Journal, Jan. 1934, Vol. 88-89, P. 40

with a higher bidder, reservation of right to reject bids, what constitutes a contract, changes in specifications, erroneous bids, and bring action for illegal contract.

There is very little duplication and as the article is so incomplete; the writer feels that there is a lot left to be done in presenting the views of the Supreme Court decisions on all phases of the bid procedure; on supplies, textbooks, repairs, improvements, furnishings, equipment, busses and fuel as well as on construction.

CHAPTER II

STATE STATUTORY REQUIREMENTS

Construction Contracts. In studying the general school laws of all the states, there are twenty-eight states regulating the construction of schoolhouses in requiring that competitive bidding be employed. Seventeen states require all expenditures ranging from over $25 to over $1,000 to require bids. The most of these set the amount at $500, they are California, Idaho, Iowa, Kansas, New Jersey, Nevada, Minnesota, Oregon and South Dakota; North Dakota requires all expenditures over $200 to be let to the lowest responsible bidder. Seventeen state statutes prescribe that all awards upon competitive bidding shall be to the lowest responsible bidder. Nevada states that award be made to the lowest and best bidder.

Contracts for Supplies. There are only three states, District of Columbia, New Jersey, and Pennsylvania that have special sections relating to supplies. Usually supplies are included in the sections dealing with expenditures over a specified sum.

Textbooks. Ten states have textbook commissions which are required to make adoption upon bids submitted by the publishers.

Fuel: There are only four states having sections specifically requiring contracts for coal to be awarded upon competitive bids, they are District of Columbia, New Jersey, Oregon and

North Dakota on lignite.

Busses. As far as the writer could discover in this study North Dakota is the only state having a law requiring the award of contracts to the lowest responsible bidder for bus drivers in the transportation of children to school.

Court Decisions. The District of Columbia and the nineteen states, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Maine, Mississippi, New Hampshire, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, Vermont, Virginia, West Virginia and Louisiana, have never had a case involving this particular subject of bids tried in their courts, of which twelve have no statute bearing on the subject of bids.

Common Practice. Even though there are no statutes in some states on competitive bidding in the awarding of school contracts, most of the statutes practice this method of procedure in awarding contracts involving a large expenditure.

STATE STATUTES ON BID PROCEDURE

States	Bldgs.	Books	Over $	#cases	Reference in Statutes
Alabama		x		2	1924 Art 23 Sec 365-404
Arizona	x	x			1931 Art 7 Sec 1049, 2605
Arkansas		x		1	1931 Sec 9069
California	x	x	500	4	1927 Sec 1612
Colorado					1933, 1935 Bill #71 Sec 12
Connecticut					1931, 1934 Chap 21
Dist. of Col.	x		25		1927 Title 30
Delaware	x		500	1	1931, 1935 Sec 11
Florida	x	x			1934, 1935 Sec 203
Georgia		x			1933 Sec 37-45
Idaho			500		1931 Sec 68
Illinois				1	1934
Indiana				3	1931
Iowa	x	x	500	2	1929 Sec 4451, 4370
Kansas			500		1927 Sec 195, 1935
Kentucky				3	1930
Maine					1931
Louisiana			500		1932, 34 Act 73, Sec 1
Mass.				1	1930
Maryland	x		1000	1	1933 Ch 226 Sec 59A
Michigan	x			2	1931 Sec 7388
Minnesota			500	5	1935 Sec 91-92
Miss.					1930
Missouri		x		3	1933 Sec 9491
Montana			250	2	1927 Sec 1016
Nebraska				2	1929 Sec 73
New Hampshire					1931
New Jersey	x		500	12	1925 Sec 65-66
New Mexico	x	x	500	1	1931 Sec 144
Nevada		x	500		1927 Sec 231 Ch 375
New York			1000	12	1934 Sec 875 Subd 8
North Carolina					1923, 1927
North Dakota	x		200	2	1931 Sec 1340 Ch 235, 195, 238
Ohio			1000	10	1928 Sec 7633, 2362, 1828
Oklahoma		x		1	1933 (C.L.) 1909 Sec 8027
Oregon			500		1927 (Sec 35-1331, S.L. 1931)
Pennsylvania			300	10	1933 Sec 617
Rhode Island					1929
South Carolina					1929
South Dakota			500		Sec 7384
Tennessee	x		100	1	1927 H.B. 667
Texas		x		1	1933 (St. 1914 Art 2844
Utah	x	x		3	1931 Sec 4639, 4556
Vermont					1929
Virginia					1929
Washington			300	1	1927 R. Rev. St Sec 4804, 4776
West Virginia		x			1931 Sec 10
Wisconsin			1000	1	1928 Sec 40.54
Wyoming			200	1	1933 Sec 191

CHAPTER III

ADVERTISING FOR BIDS

Length of Time to Advertise. The length of time that an advertisement must be published varies according to the statutes in the states and somewhat on the type of contract to be awarded.

The most common requirement among the states is two weeks for construction work, and expenditures involving an amount greater than the limit prescribed by the statute. In the adoption of textbooks, advertising for thirty days is quite common although California requires sixty days' notice. In a few instances ten days are all that the statute requires but specifies publication in two issues of a weekly newspaper. Ocassionally one publication one week previous to the opening of the bids is all that is required.

It is advised that one should study his own state statute to learn the legal requirements applicable to his home state as no general rule will apply. Those states requiring two weeks publication in contracts involving an expenditure over a certain amount are: California, Idaho, Michigan, Minnesota, Missouri and Montana.

North Dakota Requirements. North Dakota[1] requires thirty days notice in which three successive weekly insertions appear in building school houses, applicable to all districts; ten

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[1] General School Laws 1931, Sec. 1340, Ch. 235, Sec. 1494a3, 1828, Ch. 195, Ch. 238.

days notice or one publication in a legal county newspaper for all expenditures of an aggregate amount greater than $200 other than a building contract; three weeks for the construction, remodeling, providing or furnishings, and equipment in special school districts; posting notice for ten days in three most public places for busses; and for lignite coal, advertisement shall be in a newspaper published in and having a general circulation in the state.

The first advertisement appearing in a newspaper need not necessarily be formally approved by a board of education previous to its appearance if a board ratifies it subsequently as in the case Schwitzer v. Board of Education,[2] where the board formally authorized the advertisement the day following the insertion by the building committee.

Where the statute states no time or manner of advertisement some form of reasonable public notice must be given. In New Mexico the statute required competitive bidding for expenditures involving amounts greater than $500 but it did not describe the method of advertising.[3] (Sec. 1581 has changed since, see 1931 Sec. 144.) In the case Mays v. Bassett[4] the court held that it is implied from the nature of the statute that there should be notice, and notice means some manner of

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[2] Schwitzer v. Board of Education of City of Newark (1910) 75 A. 447.

[3] New Mexico 1931 Sec. 144 replaced Sec. 1581.

[4] Mays v. Bassett (1912) 125 P. 609, 17 N. M. 193.

advertising.

Where Advertised. Advertisement must be in a newspaper qualified to publish legal notices. This is usually one published within the city in which the work is to be done or in one published in the county seat of the county in which the work is to be done. If there are no such newspapers within the county, then one in an adjacent county will serve, or any newspaper within the state having general circulation in the county where the work is to be done.[5]

Language Used in Advertisement Should Be Clear and Definite. The advertisement must be so worded that there will be no doubt in the minds of reasonable men as to its meaning and thus provide a common basis for competitive bidding. In Maloney v. Maddever,[6] the advertisement called for bids on 1450 tons of 'pure anthracite coal that will meet the government test.' The question arose is, "Were the bidders sufficiently informed to enter intelligent bids?" It was held,'pure' meant separate from all heterogenous or extraneous matter and was not synonymous with "true or hard." A notice stating, "That anthracite coal must meet the government test for such anthracite," was held sufficiently definite to meet the statutory requirements for competitive bidding.

In Hibbs v. Arensberg,[7] the specifications called for,

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[5] New Mexico School Law 1931, Sec. 230.

[6] Maloney v. Maddever, et al (1912) 136 N. Y. S. 498, 77 Misc. Rep. 340

[7] Hibbs et al v. Arensberg et al (1923) 119 A. 727, 276 Pa. 24.

"The face brick...to be a thoroughly vitrified, wire-cut, face brick of such color as will be selected by the architect and school board...to cost no more than $51 per thousand." This was held sufficient for an intelligent bid because anyone in the contracting business should know the meaning of these terms which are commonly used in their line of work.

Another case McGreevey v. Board of Education[8] is illustrative of this point. McGreevey presented a bid of $1215 for the excavation for a schoolhouse. Upon learning that the plan was drawn on the scale one eighth-inch equals one foot instead of one-fourth inch equalling one foot as he had believed, he was permitted to modify his bid to $1800, which was still the lowest bid. It was held that the board and McGreevey entered an illegal contract. There is no doubt in the minds of reasonable men but what the advertisement was sufficiently clear in this case when he was the only bidder to make this error.

Advertisements Should Contain All Essential Elements. An advertisement should state when and where the plans, drawings and specifications therefor may be seen and examined; the place where, and the day and the hour when the bids will be opened, and the closing date of accepting bids. It should reserve the right of the board to reject any and all bids; that a certified check on some acceptable solvent bank for

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[8] McGreevey v. Board of Education (1900) 20 Ohio Cir. Ct. 114. 100 C. D. 724.

not less than 5%, usually of the amount of the bid must accompany the bid as a guarantee that the bidder will enter into the contract if his bid is accepted.

A Bid Filed After Closing Date Illegal. A bid filed after the date specified as the closing date cannot be considered and any bid accepted thereafter is illegal. In State v. York County Commissioners,[9] the commissioners awarded a contract to furnish the county officers with books, blanks, and stationery to one whose bid was filed January 10, when the bids should have been filed before January 1. The court held that the commissioners had no authority to consider a bid filed thereafter as the statute is mandatory. When a statute specifies a certain date it must not be disregarded. Also in State v. Cincinnati, the board accepted a bid after the date fixed in the advertisement and the court declared this an illegal bid. This was an attempt to submit a new bid including a Detroit Automatic Stoker and for installation of a heating and ventilating system after the first bids were opened and had been considered.

> "It is clear that the attempt to award the contract in this manner is wholly unauthorized, illegal and void, which upon proper application to a court of competent jurisdiction should be enjoined. Clearly discretion to reject all the bids refers to such bids as are received in pursuance of the advertisement and cannot relate to an independent and wholly unauthorized bid received after the date fixed in the advertisement."[10]

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[9] State of Nebraska ex rel Whedon v. Com'rs of York County (1882) 13 Neb. 57, 12 N. W. 816.

[10] State ex rel Mathis Bros. Co. v. Board of Education (Cinn. (1905) 27 Ohio Ct. R. 832.

Corrected Bid Filed After Closing Date Not Illegal. If a bidder discovers and error after submitting a bid as in the case of Zimmerman v. Miller[11] where a contractor handed in a correction of his bid the day after time set for accepting them, but before they were opened. It was held that the board cannot refuse to accept a bid on the grounds that it is an illegal bid and not accompanied by a certified check. Such a bid is not considered a new bid accepted after the date fixed in the advertisement, but an amendment or part to be attched to his former bid. It was held to seem clear to reasonable men that the board made a mistake in rejecting this bid which complied with the intentions of the statutes.

Advertisement for a Branded Product Not Illegal. If an advertisement specifies a branded product such as advertising for bids for installing the Monarch system of ventilation in a schoolhouse, as in the case of McBride v. Ashley[12], a contract is not invalid and not in violation of statutes preventing competitive bidding. It is clearly within the discretion of a board to adopt any patented, copyrighted or exclusively sold device which in their good judgment is the best.[13]

Adoption of Branded Product After Advertising Not Illegal. If an advertisement does not specify a particular brand, trade mark, or system, the board may afterwards adopt a particular

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[11] Zimmerman et al v. Miller et al (1912) 85 A. 871, 237 Pa. 616
[12] McBride v. Ashley (1916) 154 N. Y. S. 1010, 91 Misc. Rep.
[13] North Dakota School Law, 1931 Ch. 235, Sec. 2.

suit was a verified account showing a balance due and unpaid. The balance due was the amount of freight charges on shipments prepaid by the Cement Products Co. The board sought to evade the obligation on the ground that the contract was illegal in not obeying the statute in respect to advertising for competitive bidding. It was held not to invalidate the contract, as the bidder's terms were before the board for their inspection and favorable action was taken thereon. "A written bid need not be signed by both parties to be bound. The signature of one, the acceptance of the bid by the other, followed by shipment and delivery of the articles and their acceptance will constitute the binding executed contract."

Contract Awarded With Date of Completion Omitted in Advertisement Illegal. An advertisement should state the date of required completion of the contract in order to permit competitive bidding on a common basis. If an advertisement omits this element as it did in Edmundson v. Board of Education,[17] in which, as a result of the omission the bidders submitted dates ranging from October 1, 1915 to September 1, 1916, it was held that such an omission prevents computation of bids on a common basis. To open the element of the time of completion in proposals, it is easy to see how the door to the perpetuation of fraud may be opened. Bidders should be informed by advertisement or the specifications on file of those matters needed to enable them to bid intelligently.

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[17] Edmundson v. Board of Public Education of School Dist. of City of Pittsburgh, (1915) 94 A. 248, 248, Pa. 559.

Boards May Act Independently of Advertisement When No Statute Requires Advertising. In states where there are no statutes requiring competitive bidding and a board of education proceeds to advertise for proposals anyway, a board may act independently of the advertisement as long as it acts in good faith and with reasonable discretion. The New Jersey case Kraft v. Board of Education[18] well illustrates this point. Bids were submitted in response to an advertisement for furniture. Several sample desks were displayed by the various bidders and the board finally decided to adopt the Saunders desk at $4.45 instead of the desk at the lowest bid. This particular desk appeared to be well constructed, stronger and possessed certain features which made it appear to be a better value for the price than the others. The board acted in good faith and with reasonable discretion as any prudent man would do in a business transaction.

In Coward v. City of Bayonne a New Jersey case, a board was not required to advertise but it did, reserving the right to reject any and all bids. The contract was awarded to the second highest bidder for the installation of a heating and ventilating system, without reference to advertisement even though it contained a clause, "none but union labor shall be employed." The court explained as follows:

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[18] Kraft v. Board of Education of Weekawken Tp. (1902) 51 A. 483, 67 N. J. Law 512.

> "Although the board did actually advertise for proposals, they were not required to award the contract to the lowest bidder; and the award of the contract to a higher or the highest bidder, or to some one, who did not bid at all, would not in the absence of bad faith and corruption, be regarded as such an abuse of that discretion conferred upon them by law as to justify interference by this court."[19]

In Missoula County Free High School v. Smith, a board of trustees of a county high school advertised for bids for the erection of a schoolhouse. The board accepted the lowest bid, that of Hightower for $134,736, but made some changes, omissions and alterations to reduce the contract price $24,000. Some taxpayers contended that this was a violation of the statute requiring bids, while the defense claimed the statute did not apply. There was no statute relating to school districts applicable to county high schools; each was operated under and was regulated by separate laws, hence the board in this case may act independently of the advertisement.

> "A county high school can be created only by the county; its trustees are a county agency; property acquired for its purposes is county property; and any obligations incurred in its behalf is a county obligation. The provisions relating to school districts were not applicable to county high schools; each operated under and was regulated by separate laws."[20]

Statutes Do Not Apply to All School Districts. Sometimes a state statutes does not apply to all types of school districts and in order to know, one must study his own state statutes. Where the procedure of awarding contracts is

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[19] Coward v. City of Bayonne (1902) 51 A. 490, 67 N. J. Law 470

[20] Missoula County Free High School v. Smith (1932) 8 P.(2d) 800.

illegal in one type of district, it may not be in another type.

In Minnesota we have a good illustration of this. The statute applying to the purchase of school furniture, Sec. 2846, G. S. 1923, applies only to common and independent district and not to special school districts.

> "There are three classes of school districts, common, independent and special. The latter class consists of those districts, which were created by special laws prior to the constitutional amendment prohibiting the enactment of such special laws. The act creating defendant board of education as a special school district gave it full power to erect schoolhouses and to purchase any personal property necessary for the schools. The act contains no provision requiring the board to advertise for or receive bids." [21]

In special cases the district must adopt an act by referendum before it applies.[22]

A Board Need Not Advertise For Personal Services. It is not necessary to advertise and receive bids for the preparation of plans and specifications to be used in advertising for and receiving bids for any work.[23] The states of Indiana,[24] California,[25] Tennessee,[26] North Dakota,[27] Minnesota, and New York[28]

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[21] Merritt v. Hughes (Minn. 1928) 220 N. W. 164.

[22] Horton et al v. Board of Education of Borough of Oradell et al (1928) 143 A. 218 (N. J.)

[23] Cress v. State (Ind. 1926) 152 N. E. 822.

[24] Harris v. Cooley (Calif. 1915) 152 P. 300, 171 Calif. 144.

[25] State v. Brown (Tenn. 1929) 21 S. W. (2d) 721.

[26] Rosatti v. Common School Dist. No 96 Cass County (1925) 204 N. W. 833, 52 N. D. 931.
North Dakota School Law 1931, Ch. 235, Sec. 2.

[27] Krohnberg v. Pass (Minn. 1932) 244 N. W. 329.

[28] Kiehm v. Board of Education of City of Utica (1921) 190 N. Y. S. 798, 198 App. Div. 476.

have all had cases involving the legality of hiring the services of an architect without competitive bidding. In all cases it has been decided that statutes do not require that notice shall be published and bids received for the work calling for personal services. This not only includes architects but also includes engineers,[29] inspectors,[30] and superintendents,[31] of construction.

Neither need a contract for a site for a school building be submitted to competitive bidding as explained in State v. Brown. It was charged in that case that the board of education entered a contract with architects for the consideration of 6% and also selected a site which incurred unnecessary expense for sidewalks, sewage, etc., proceeding without competitive bids. It was further charged, in this case, that equally as good architects could be secured for the consideration of 4%. The reasoning of this case is quite typical of similar cases and is quoted as follows:

> "In our opinion, a general requirement that contracts made by a public commission or committee be submitted to competitive bidding does not apply to the contract for the purchase of a particular piece of land selected as the site of a proposed public building, nor to a contract for the personal services of an architect."[32]

Coal Is Not Included In Supplies. Coal is not considered

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[29] Krohnberg v. Pass (Minn. 1932) 244 N. W. 329

[30] Hibbs v. Arensberg (1923) 119 A. 727, 276 Pa. 24.

[31] Cress v. State (Ind. 1926) 152 N. E. 822.

[32] State v. Brown (Tenn. 1929) 21 S. W. (2d) 721.

as supplies and not intended to be included as supplies.[33] In the purchase of fuel, gradation of quality of coal, heating, capacity, adaptability to heating apparatus, and experience and skill of persons managing school furnaces are essential facts to be considered in making the selection. Broad discretion is reposed in a board of education and the acceptance of other than the cheapest will not be enjoined where a board has acted in good faith.[34]

Award of Contract Must Be Within Reasonable Time After Advertising. The advertisement for bids does not legally extend beyond the period for the awarding of the first contract. Legal requirements are not met if a contract is not executed by the lowest bidder, and then later a contract is awarded to the next lower bidder with the date of completion later than that specified in the advertisement.[35] The acceptance of a bid must be within a reasonable time after advertising.

The plans and specifications do not necessarily have to be submitted and approved by authorized officers before the bids are called for by advertisement, but it would be better practice to do so, and thus avoid possible complications or delays in case they are not approved. As long as approval is secured before contract is executed the statutory requirement is met.[36]

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[33] White v. Moore (1927) 136 A. 218, 288 Pa. 411.

[34] Gosline v. Toledo Board of Education (1908) 30 Ohio Cir. Ct. R. 503.

[35] Mulcahy v. Board of Education (1928) 159 N. E. 324, 250 Ohio App. 492.

[36] Hales v. Board of Education, Jordan Sch. Dist.(Utah 1933) 18 P. (2d) 899.

CHAPTER IV

SUBMITTING BIDS

Who May Submit Bids. A sufficient number of copies of plans and specifications must be prepared so that all prospective bidders who make application may secure copies as intended by the statute. To fail in having enough copies may allow fraud and favoritism to enter, since a limitation of the number of copies may enable a combination of bidders to secure all of them and prevent competition from any outside bidders.[1] No school officer shall be personally interested in any contract requiring the expenditure of funds except as provided by the statute.[2]

In North Dakota to entitle a contractor to a copy of the plans and specifications for construction of a public building amounting to more than the sum of $3,000 such contractor must have maintained an office within the state for at least one year prior to the date of his request.[3]

There are no legal requirements regarding the qualifications of a bidder but often home contractors are preferred.

A board of education cannot practice what is known as "pre-qualification of bidders," defined as the determination of a contractor's competency and responsibility to satisfactorily complete a given construction project before he submits

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[1] Hibbs et al v. Arensberg et al, (1923) 119 A. 727, 276 Pa. 24.
[2] North Dakota School Law 1931 Sec. 1349.
[3] North Dakota School Law 1931 Ch. 195, Sec. 3.

his bid. In the case of J. Weinstein Building Corporation v. Scoville, the advertisement for bids for the erection of a schoolhouse requested submission of a financial statement and an experience questionaire with the application for a copy of the plans and specifications; without stating the purpose of these in the advertisement. The court gave the following reasoning:

> "The statutory requirement of competitive bidding is for the protection of the taxpayers, and is based upon the theory that competitive bidding will reduce prices. However, praiseworthy the motives of the board of education of the City of Mt. Vernon, it has clearly erred in its attempt to prevent competition by limiting those who may compete."[4]

Submit Bid To Whom. Proposals or bids are usually submitted to the clerk of the school district, or secretary of the board of education in the city, where the contract is to be executed, but a board of education may appoint a building committee and delegate the authority of advertising and receiving bids to them. A board may delegate ministerial duties but not discretionary. In School District No. 3 v. Western Tube Company, it was alleged that the board did not advertise for bids for the heating apparatus as required by statute, because the building committee advertised, received bids, and awarded the contract, but the court stated:

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[4] J. Weinstein Bldg. Corp. V. Scoville (1932) 254 N. Y. S. 384, 141 Misc. Rep. 902.

> "The purpose of the statutory requirement was complied with, if, indeed, the compliance was literal, taking the two statutes together. We are not inclined to accept the technical construction contended for. The advertisement of the committee was accepted by the board, as well as its award of the contract; and in the respect the two bodies... board and committee...combined in the award. There was a sufficient advertisement for bids to award the contract."[5]

In Schwitzer v. Board of Education, a committee handled the advertising, accepting of bids, opening of bids and reading of the bids and it was held that,

> "The function of advertising was purely ministerial or administrative, and could be properly delegated. Those changes in specifications were minor and within the specifications to that effect and did not affect the heating, lighting, ventilating or other hygienic conditions, nor to any other matters regulated by school law. The rules of the board directed the committee to "advertise for bids for the required work as directed by law," secondly the action of the committee was ratified by the board.[6]

Bids for the adoption of textbooks are submitted to the State Superintendent of Instruction, County Superintendent or other persons having official capacity as Secretary of the Textbook Commission according to the statutes of the various states. North Dakota has no state adoption of textbooks hence there are no contracts for books awarded on competitive bidding.

Formality of Bids. A bid must conform to the advertisement in all respects that are material and essential to meet

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[5] School Dist. #3 Carbon County v. Western Tube Co. (1905) 80 P. 155, 13 Wyo. 304.

[6] Schwitzer v. Board of Education of City of Newark (1910) 75 A. 447.

the requirements of the state statutes; in the case Perkins v. Bright the bids for the erection of a schoolhouse were submitted and a contract awarded and entered into by a bidder whose bid was in the form of $6,950, as the amount for materials, $6,950 for labor, and the total $6,950. The statute required that bid should be stated separately when both labor and materials are embraced in the work bid for, none but the lowest bid shall be accepted, and any part of a bid which is lower than the same part of any other bid, shall be accepted. The bid was too informal for acceptance.

> "To place the figure at the same amount for both labor, material and the total thereof is in utter disregard of the letter, spirit, and intent of the section of the statute in question, and subversive of its purpose."[7]

If sample or specimen copies are required by a statute, and only thirty printed pages of a textbook are presented with the bid, the bid was held not in compliance with the statute.

> "As the words "Sample Copy" and Specimen Copy" so well convey their own meaning, no reason is perceived for resorting to any other means of arriving at the sense in which they were intended by the Legislature to be understood."[8]

In Warnock & Zahrndt v. Wray, it was claimed the bid of the Bareham & McFarland, Inc was informal and should be rejected on the grounds of naming the Sturtevant Company,

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[7]Perkins v. Bright (1923) 141 N. E. 689, 109 Ohio St. 14.
[8]State Text-Book Commission v. Weathers (1919) 213 S. W. 207, 184 Ky. 748.

but before they were opened, this correction of his fomer bid made his $900 lower than the next bidder to whom the contract was awarded. The board refused to accept the corrected bid on the grounds that it constituted an illegal bid in not being accompanied by a certified check and was received after the closing date, but it was held that the correction did not constitute a new bid and was not informal in not being accompanied by a check as it was merely a modification of his former bid which in all respects met the legal requirements.

In Tooele v. Tooele High School District #1,[12] the contract was awarded to a bidder whose bid was not accompanied by a certified check as provided by the statutes. An effort was made to set aside this contract as being illegal but here the court held that as the contract had been entered into and a bond furnished, the charges were not sufficient to warrant error as the board acted in good faith and the check was immaterial.

Bidding on Alternates. In advertising for bids the board of education often desires to get bids on several different makes, brands, or trade marks which they have in mind. In order to secure several estimates to choose from in their final deliberations, the advertisement must contain clauses inviting bids on the alternates. Alternates meaning a second choice or substitute.

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[12] Tooele Bldg. Ass'n v. Tooele High School Dist. #1 (1913) 134 P. 894, 43 Utah, 362.

American Blower Company, and the Clarage Company as subcontractors and manufactuerers of the fans, with the option of the bidder of selecting the company, also the word none was used in place of ciphers in amounts for alternates to be added or subtracted. The plaintiff specified only the Sturtevant Company in his bid on heating and plumbing and claims the right to the contract. It was held not informal as to require rejection because of failure to bid on the alternates.

> "The school is not being constructed for the benefit of contractors but for the benefit of the city, and the specifications and rules of the board and the bids of contractors must be construed accordingly. It is the interest of the city that is the determining factor, provided the statutory provisions relating to the letting of contracts have been observed. The irregularities complained of, however, do not violate the principle of competition which the statute requires."[9]

A bid quoting the price, "at just what it costs to lay them down," is too indefinite, and no award can be made thereon. However, the omission of two articles of insignificant value such as a knife, eraser and a bottle of ink in a bid for a large amount of supplies which contains all of the other articles advertised for, does not render the bid unacceptable when it is otherwise in proper form.[10]

In Zimmerman v. Miller,[11] the plaintiff handed in a correction of his bid after the time set for accepting them,

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[9] Warnock & Zahrndt v. Wray (1928) 230 N. Y. S. 681, 132, Misc. Rep. 882.

[10] State of Nebraska ex rel Whedon v. Com'rs of York County (1882) 13 Neb. 57, 12 N. W. 816.

[11] Zimmerman et al v. Miller et al (1912) 85 A. 871, 237 Pa. 616.

The submission of a bid containing two alternative clauses not called for in the specifications, does not affect the legality of the award of a contract to the lowest bidder, as illustrated in the case Pugsley v. Board of Education.[13] The Gallo Brothers submitted the lowest bid of $36,488 but added two alternative clauses of $550 and $450 more to the above. The plaintiff was next lowest bidder for $37,460. The acceptance of either alternate would still make the Gallo bid the lowest.

In Ebbeson v. Board of Public Education the board of education accepted the Francis Company bid of $409,000 or $414,500 on alternatives when Herzog's bid was for $405,000 or $408,000 on the same alternatives. The specifications required that both sub-contractors and men employed must be bonafide residents of Delaware; give names and addresses of sub-contractors and that certain sash devices to be manufactured by Lond & Burnham Co. The lowest bidder failed to comply with the condition requiring the use of Delaware sub-contractors in the erection of the schoolhouse, and it was held that the acceptance of a higher bid was proper.

> "The cases hereinbefore cited lead inevitably to the conclusion that the sort of regulation which the board laid down and which is here objected to is beyond the condemnation of any constitutional inhibition."[14]

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[13] Pugsley v. Board of Education of Mine Hill Tp. (N. J. 1925) 130 A. 822.

[14] Ebbeson v. Board of Public Education in Wilmington (Del.1931) 156 A. 286.

It is not necessary for a bidder to submit a bid on all the alternatives in the specifications for example in the case of Farrell v. Board of Education,[15] the specifications for the new school called for proposals, for the heating and ventilating work and equipment, upon the basis of a base bid and thirty-four alternates, it was not necessary to bid on all thirty-four alternates.

The method of awarding construction contracts on the alternate "for the work to be done on a cost, plus basis with a maximum cost," has practically disappeared. A few states have legislation prohibiting this method. For those interested in learning more about this method it is suggested to refer to the case Bauman v. City of West Allis.[16]

Bidding on The Aggregate. In all construction work there are two parts, the furnishing of materials, and the furnishing of labor. Sometimes it is more economical to award separate contracts for these items and again sometimes a greater saving can be made to award one contract to a firm furnishing both labor and materials.

The term 'aggregate' as used in inviting bids, means the combination, or total of both labor and materials. The case Hudson v. Board of Education[17] illustrates and explains the use

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[15] Farrell v. Board of Education of Town of West Orange in Essex County (N. J. 1932) 157 A. 656 10 N. J. Misc. R. 88.

[16] Bauman v. City of West Allis (1925) 204 N. W. 907, 189 Wis. 506.

[17] Hudson v. Board of Education of Wheelersburg Rural School District, et al (1931) Ohio (1932) 179 N. E. 701.

of the term quite well. Two separate buildings were to be constructed by the board of education of Wheelersburg, Ohio.

It is alleged that the contract was not awarded lawfully to the lowest responsible bidder. The board awarded the contracts for both buildings to the bidder whose aggregate of both buildings was lowest and not in two separate contracts where a saving of $247 could be made.

The court reasoned as follows: The term "lowest in the aggregate," within the statute providing for acceptance by the board of the lowest responsible bid for construction work, relates to aggregate bids for labor and material. The board cannot let contracts for two different buildings to a bidder whose aggregate bid is lowest, if contracts with responsible bidders might be entered into for a less sum by contracting separately for each building. Any part of a bid which is lower than the same part of any other bid, shall be accepted[18] where bids state the labor, material and total separately.

Opening and Reading Bids. A bid should not be opened until the day and hour specified in the notice and then only by those authorized to do so, neither should the contents of any bid be made public until the time when all bid received shall be publicly opened and read aloud and recorded in the minutes.

A Committee May Be Appointed To Handle Ministerial Duties.

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[18] Perkins v. Bright (1923) 141 N. E. 689, 109 Ohio St. 14.

A board of education may delegate to a committee the duty of preparing and submitting specifications, and of conducting negotiations for the contract, provided the results of the negotiations are considered by the board before the award of the contract.[19] In The Mayor and City Council v. Weathersby,[20] the bids were opened by a committee of six appointed for the purpose. It was claimed that the committee unlawfully opened and awarded the contract to Cunningham whose bid was higher than that of Weathersby. Later Weathersby received a contract from the Mayor and City Council who have legal authority to enter such contract.

In Schwitzer v. Board of Education,[21] such boards or committees representing them shall give public notice of the time and place, where and when such bids shall be received, and at such time and place they shall immediately proceed to unseal and publicly announce the contents of the bids in the presence of bidders choosing to attend and make proper record of the prices and terms in the minutes. Held that the award of a contract will not be vitiated by the mere failure of the committee receiving the bids to publicly read certain alternative estimates, where it appears that such course was pursued with the consent of the bidders, and where the bids themselves were

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[19] Kraft v. Board of Education of Weehawken Tp. (1902) 51 A. 483, 67 N. J. Law 512.

[20] Mayor and City Council v. Weathersby Md. (1879) 52 Md. 442.

[21] Schwitzer v. Board of Education of City of Newark (1910) 75 A. 447.

publicly read, and no fraud is claimed or indicated. Also an award of a contract for the building of a schoolhouse made by a city board of education was not unlawful because a committee of the board duly authorized by its rules advertised for, received, and opened the bids, it appearing that the committee after opening the bids, reported to the board as a basis for its action.

In Tanner v. Nelson[22] it was held that there was substantial compliance with the statute requiring the convention to meet and publicly open and read the proposals. The bids for furnishing schoolbooks were voluminous, and contained large catalogues, price lists, etc., and on the first day of the session the bids were publicly opened, and the introductory portions of each bid, and the communication accompanying them, were read, then the proposals were referred to committees on tabulations, and were open to the inspection of all persons interested therein.

> "To read everything contained in the pamphlets and catalogues would require an unreasonable length of time, no one would be benefited by lengthy reading, no one was injured by not reading them, and the intention of the law is to insure fair and impartial consideration of proposals."

A Bid Cannot Be Withdrawn After Acceptance. In People v. Board of Education[23], a contractor bid of $794,000 submitted January 12, was the lowest bid for the construction of a new

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[22] Tanner v. Nelson State Supt. of Public Instruction (1902) 70 P. 984, 25 Utah 226.

[23] People ex rel Connor's v. Board of Education of City of New York (1921) 188 N. Y. S. 686, 197 App. Div. 5, judgment affirmed 134 N. E. 550, 232 N. Y. 510.

building, but this was not within the amount appropriated by the board of estimate and apportionment. The board adopted a resolution subject to favorable action of the board of estimate and apportionment awarding contract to said contractor. On the thirty-ninth day after the submission of the bid, the board awarded the contract to the contractor, and on February 19, relator wrote withdrawing his bid because of an increase in cost of work and requested the return of the deposit. This the board refused to do. Action was then brought to recover the deposit. The court ruled as follows:

> "The only theory on which the relator would be entitled to withdraw his bid and to the return of his deposit is that the defendant took an unreasonable period of time in considering the award of the contract, but I deem it quite clear that it cannot be so held."

An Attempt To Correct An Error Does Not Constitute With-Drawal. An attempt to correct an error in the bid does not constitute a withdrawal of a bid nor a refusal to contract. In Cedar Rapids Lumber Co. v. Fisher, when Fisher was notified by telegraph "You are low bidder. Come on morning train." He informed them that he had made a mistake in his figures, they communicated to him their desire to change the specifications by using more expensive material than specified. The board did not call upon him to contract in accordance with his bid, nor did it give him a chance to refuse to do so, but the board proceeded to contract with a third party who did not bid and declared that the deposit was forfeited.

> "The action of the board did not make a completed contract. Telegram was insufficient to constitute an acceptance. There was no refusal to contract on the part of the bidder so as to authorize the forfeiture of the deposit accompanying the bid. Board has no right to reject all bids and enter into a contract with a nonbidding party, and then recover of the lowest bidder the difference between his bid and the price at which the contract was let."[24]

Refusal to Enter Altered Contract Not a Withdrawal. Refusal to enter a contract containing matters not in the specifications does not constitute a withdrawal or refusal to contract so as to forfeit deposit. Smith v. St. Louis County Second School District illustrates this point: Smith's bid was the lowest, was accepted, and the board voted to award him the contract. The architect for the school district drafted a contract based on specifications but it was not delivered, so the attorney for the school board drew a new contract varying from the specifications. The parties were unable to agree on a contract so the school board let the contract to another bidder, and refused to return the deposit. Action was brought to recover the deposit. It was held:

> "It is not necessary to refer in detail to the various drafts of proposed contracts, as it is clear that the minds of the parties did not meet and that no contract was ever agreed upon."[25]

Check Forfeited Upon Refusal of Bidder to Enter Contract. In Independent School District #102 v. Farmer's & Merchants[26]

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[24] Cedar Rapids Lumber Co. v. Fisher May et al (1906) 105 N. W. 595, 129 Iowa 332, 4 L. R. A. NS 177.

[25] Smith v. St. Louis Co. Second School District (1909) 108 Minn. 322, 122 N. W. 173

[26] Independent School Dist.#102 of Pennington Co. v. Farmer's & Merchants State Bank of Thief River Falls (McAdams, Intervener) 1922 190 N. W. 539.

State Bank, McAdams was the lowest bidder on a new schoolhouse to be erected. He did not sign nor execute contract nor file surety bond, but notified the school board of an error in his bid. An effort was made to adjust the error, the board offered him the proposition of an additional payment equal to the amount of the error and an extension of time but the surety company refused to issue the necessary bond. McAdams tried to dispose of the entire affair and asked for a return of the check which the board declined to do. Action was brought to compel the bank to cash the check on which the payment was stopped. It was held, "that the check was a part of the bid, to be forfeited if the successful bidder failed or refused to enter into a contract on the acceptance of his offer." This was an attempt to withdraw a bid which constituted a refusal to contract which could not be done without forfeiture of the deposit.

CHAPTER V

ALTERATION OF BIDS

'Alter' means to change, vary, modify, transform or to become different. As used in this study, it refers to the difference between the bid and the contract awarded upon the basis of that bid.

Wherever statutes require that contracts be awarded upon competitive bids, it is essential that all bidders be treated alike and that no favoritism, fraud, or corruption be present. It is the purpose of this chapter to set forth the rules governing the alteration of bids and to describe and illustrate the limitations upon boards of education in the awarding contracts upon altered bids.

Alterations May Be Made When No Statute Applies. In the absence of statutes requiring the advertisement for letting contracts upon competitive bidding and the board does advertise, a board may make changes, alterations and omissions as they see necessary.[1] In Missoula County Free High School v. Smith the contract price was reduced $24,000 and since there was no statute prohibiting or regulating the procedure the court could not interfere.

When a statute requires the letting of contracts by the bid procedure a board of education may not change, alter nor omit any essential part to increase or decrease the contract

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[1] Missoula County Free High School v. Smith (Mont. 1932) 8 P. (2d) 800.

price. In Criswell v. Board of Education, after opening the bids for the erection of a schoolhouse according to certain specifications, the plans were changed to reduce the cost of the building about $6,230. This was deducted from the lowest bid and a contract was awarded. During the progress of construction the board changed plans to install a more expensive heating plant, allowing $1500; extra work was ordered on the foundation and $892.50 was allowed; numerous other minor changes were made by the contractor for his benefit without the knowledge or the authority of the board, and these changes were estimated at $1200. It was held, that the contractor and the architects collusively and fraudulently changed the plans and specifications and substituted inferior materials in the course of construction in order to obtain an excessive and dishonest profit. The reasonable value of the completed building was $20,535.56 and that common honesty requires that the board should pay the reasonable value thereof.

> "Where the plan remains substantially the same and the parties act in good faith, detail features, which are not necessary to the building, and which do not change the substantial character of it, may be eliminated on terms agreeable to the board and the bidder entitled to the contract upon the plans as advertised. Where a proper deduction from his bid is made on account thereof, such a change in the specifications would not be ultra vires of the board. There is no evidence of any bad faith on the part of the board or the defendant Grant in this respect."[2]

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[2] Criswell v. Board of Directors of Everett School Dist. No.24. (1904) 75 P. 984. 34 Wash. 420.

In Re Chester School District Audit action was brought to stop alleged illegal expenditures. The architect was authorized by the board to order extra work when necessary and to increase or diminish the contract price accordingly; it was held that the school directors may without complying with the statutory requirements of public notice and competitive bids authorize minor changes in the original contract not constituting and independent undertaking.

> "A new departure must not vary from the original plan to be of such importance as to constitute a new undertaking, which the act controls, and where fairness could only be reached through competitive bidding."[3]

In Pennsylvania the statute requiring bids is mandatory for all contracts in excess of $300 even though the board had authority to contract for a job of installing new windows for $290 and after work was commenced it was found that extra work had to be done because of the rotten lumber in the old frames. The additional work necessary to repair the old frames would bring the cost in excess of $300; hence the board was required to submit such work to competitive bidding.

> "The use of the word 'shall' leaves no room for the exercise of either option or discretion on the part of the board in so far as contracts exceeding the amount stated are concerned."[4]

Refusal to Enter Altered Contract Does Not Forfeit Deposit. A board may not accept a bid which does not conform to the

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[3] In Re Chester School Districts Audit (1930) 151 A. 801, 301 Pa. 203.

[4] Summit Hill Directors, in re (1917) 102 A. 278, 258 Pa. 575.

specifications and enter into a contract which calls for the date of completion differing from that in the advertisement nor may a bid which does not conform to specifications be changed or corrected after opening of the bids. If a board changes the specifications it cannot hold the lowest bidder to the contract and declare the deposit forfeited.[5]

Contract Not The Same as Original Bid Is Void. In Scola v. Board of Education, a board of education could not modify the specifications by changes and award the contract to a former bidder, though the lowest. The contract was for erecting a central heating plant according to the revised specifications, at a price less than the original bid.

> "Indeed this rule that a contract must conform to the specifications is one so essential to the preservation of the policy to be carried out by competitive bidding that it has been recognized whenever the matter has been brought under judicial notice."[6]

In State v. Mathis Brothers Co.,[7] the board was not allowed to proceed with the award of a contract for installation of heating and wentilating system upon a bid not based upon the original specifications and received subsequent to the designated time in the advertisement. To award a contract in this manner is wholly unauthorized, illegal and void.

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[5] Cedar Rapids Lumber Co. v. Fisher, (1906) 105 N. W. 595. 129 Iowa 332, 4 L. R. A. (N. S.) 177.
Smith v. Independent School Dist. No. 12, St. Louis County (Minn. 1910) 122 N. W. 173, 108 Minn. 322.

[6] Scola v. Board of Education of Town of Montclair (1908) 71 A. 299, 77. N. J. Law 73

[7] State ex rel Mathis Bros. Co. v. Cincinnati (Board of Education) 1905 27 Ohio Cir. Ct. 832.

Error Cannot Be Corrected After Bids Are Opened. Because of an alleged mistake on the part of a bidder a board of education cannot allow him to correct his error and thereupon award him the contract even though he is the lowest bidder. In McGreevey v. Board of Education,[8] plaintiff thought that the plans for the excavation for a schoolhouse were drawn to the scale of one-fourth inch equaled one foot instead of one-eighth inch equalling one foot; he was permitted to modify his bid after they were opened and considered. By allowing a bidder to change his bid after seeing other bids leads to favoritism and violates the regulations. Citizens should know the limitations of boards before entering contracts.

Contract Void If Date of Completion is Changed. In the case of Mulcahy v. Board of Education, the lowest bidder was prevented from entering the contract because of a suit by a taxpayer. The board, over four months later, without re-advertising awarded the contract to next lowest bidder with the date of completion, September 1, 1925 as specified, changed to July 1, 1926. Quote:

> "No bids having been received for the completion of the building by 1st. day of July 1926, there was no competitive bidding for the contract, which was awarded. (Plans and specifications provided completion September 1, 1925.) A bid is an offer, and, where the time that such offer shall remain open is not provided in the bid, or by law or in the advertisement or specifications, it of course remains open for acceptance a reasonable time, and what is a reasonable time depends upon the circumstances in such case, and, if the bid is not accepted

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[8] McGreevey v. Board of Education (1900) 20 Ohio Cir. Ct. 114, 100 C. D. 724.

within a reasonable time, the offer may be considered by the bidder as withdrawn, and the public body receiving the bid cannot thereafter hold such a bidder to his bid."[9]

Contract Void If Penalty, Insurance, Surety Bond Are Omitted. To waive the penalty for failure to complete a contract within the specified time, to omit workmen's compensation insurance, and to substitute an individual surety for a surety bond, render the contract void.[10] A contract awarded with such alterations is void owing to fraudulent conduct on the part of the bidder and failure to comply with the statutes.

To make any changes or alterations in a contract, good faith and common honesty demand a re-advertisement with notice of a new condition.

A modification of a bid to omit items in order to bring the cost within the funds provided is improper, but in the execution of an incompleted contract delayed because of uncontrollable factors, such alterations necessary to the fulfillment thereof is not illegal as was pointed out in People v. Craig[11] where the installation of the heating and ventilating system was delayed for over two years because of defaults of the contractor in charge of construction.

"Confronted with such condition it was not only within the power of the board of education to secure a modification of the contract, but a duty so to do was essential to advance the cause of education."

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[9] Mulcahy v. Board of Education (1928) 159 N. E. 324, 250 Ohio App. 492.

[10] Lehigh Coal & Navigation Co. v. Summit Hill School Dist. (1927) 137 A. 140, 289 Pa. 75.

[11] People ex rel Wells & Newton Co. of New York v. Craig (1921) 232 N. Y.125 133 N. E. 419, reversing order 189 N.Y.S 324, 197 App. Div. 407.

All Bidders Must Be Acquainted With Plans Upon Which Contract Is Awarded. A bidder cannot submit a bid on his own plan and specifications and enter a valid contract as this would constitute a variation from the plans advertised for competitive bidding. All bidders would not be acquainted with the specifications in their entirety by this method. The case Kay v. Board of Education relates how the American Steel Company offered to allow a reduction of $3,500 if the height of the basement were lessened, and submitted their own working plans and specifications, which indicated their system and which had been approved by the architect seventy two hours before the opening of the bids.

> "I think it is clear from this testimony that competitive bidding for the concrete work was put upon different bases. A public board charged with the duty of obtaining bids for public work, after advertising, and of awarding a contract for it to the lowest bidder, will not have discharged its full duty in that regard where, after the bids have been received and opened, but before it has formally taken final action upon the bids, it agrees with the then lowest bidder to diminish the amount of the work in consideration of the reduction of the bid."[12]

State Building Code Must Be Obeyed. Not only must a contract agree with the plans and specifications announced in an advertisement upon which bids were received but it must also conform to the state building code. This is a legal requirement.

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[12] Kay v. Board of Education of Kearny (1912) 83 A. 954, 83 N. J. Laws 551.

"That a ceiling nine inches higher than provided for in the plans and specifications would entail an additional expenditure cannot be denied. This would result in the destruction of the benefit of competitive bidding. We are of the opinion that the board of education should be required to proceed in accordance with the law and the requirements of the code, rather than permit the construction of a building which would result in virtually the erection of a nuisance under the statute, requiring changes to be made after its erection at an additional cost and expense. Court cannot modify the plans and supervise the construction in accordance to the laws."[13]

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[13] Benzing v. Board of Education of Hamilton City School District (1932) 181 N. E. 150, 41 Ohio App. 468.

CHAPTER VI

AWARDING CONTRACT TO BIDDER

A Contract Can Be Awarded For a Reasonable Time Only After Opening Bids. A board of education can hold bidders for the erection of a schoolhouse to bids only for a reasonable time, where no time is specified. In Mulcahy v. Board of Education, the board of education received bids on July 22, 1924 for the construction of a school building to be completed by September 1, 1925. On August 26, 1924 the contract was awarded but the successful bidder was prevented from executing said contract because of a suit by a taxpayer. Thereupon the board on December 30, 1924, awarded a contract to another bidder and provided that the completion be July 1, 1926. A taxpayer challenged the validity of this latter contract.

> "No bids having been received for the completion of the building by 1st. day of July 1926, there was no competitive bidding for the contract, which was awarded. (Plans and specifications provided completion Sept. 1, 1925) A bid is an offer, and, where the time that such offer shall remain open is not provided in the bid, or by law or in the advertisement or specifications, it of course remains open for acceptance a reasonable time, and what is a reasonable time depends upon the circumstances in each case and, if the bid is not accepted within a reasonable time, the offer may be considered by the bidder as withdrawn, and the public body receiving the bid cannot thereafter hold such bidder to his bid."[1]

Continuation of a Contract Does Not Constitute The Award of a New Contract. Another case differing somewhat in details

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[1] Mulcahy v. Board of Education (1928) 159 N. E. 324, 250 Ohio App. 492.

held that the agreement to continue work under contract was not a new contract which could not be entered into without bids. This case, People v. Craig, involved a delay in completing a contract to install heating and ventilating apparatus due to defaults of contractors having charge of the construction of the building. The relator was prevented from proceeding with the work for about two years, when he announced a refusal to longer be bound by the contract unless paid for extra expense incidental to delays.

> "Confronted with such condition it was not only within the power of the board of education to secure a modification of the contract, but a duty so to do was essential to advance the cause of education."[2]

Proper Notice Must Be Given Successful Bidder. Usually the clerk of the school district notifies the successful bidder, but any member of the school board if authorized to do so, may assume the responsibility. It is advisable to make all acceptances of bids in writing.

In Grant v. Board of Education,[3] the chairman instructed contractor to proceed with the work bid upon. Upon completion of the job of grading and filling in two cellars adjoining schoolhouse, the contractor presented his bill based upon $7 per day for laborer and $19 per day for a truck and laborer.

Payment was refused on grounds that the work was not

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[2] People ex rel Wells & Newton Co. of New York v. Craig (1921) 232 N. Y. 125, 133 N. E. 419, reversing order 189 N. Y. S. 324, 197 App. Div. 407.

[3] Grant v. Board of Education of City of Bayonne (N. J. 1927) 136 A. 713.

properly authorized. It was proved that it had been customary for the chairman to receive estimates and give the job to the lowest bidder. It was held that the board of education was liable to the contractor for work under a bid accepted by unauthorized agent, held out by the board as having authority.

A telegram, "You are low bidder. Come on morning train." notifying a bidder does not constitute a completed contract nor an acceptance of the bid, in the case Cedar Rapids Lumber Co. v. Fisher.[4] Neither does a conditional acceptance of a bid obligate a school board to award a contract. Where a notice to a contractor in Clark v. Board of Education, was qualified as follows: "The acceptance of this bid is also subject to financial ability," and later the board notified bidder of the withdrawal of award of contract to construct a building because there was not an appropriation for this purpose. The contractor then sought to recover for the loss of profits of being prevented from performing an alleged contract. It would be ultra vires[5] for the board to either accept any bid for said work or to award any contract for it which was in excess of the amount available.

> "There was no acceptance of this bid. It was a conditional acceptance, which the board has no right to make, because it exceeded the amount which had been appropriated by the board of estimate and apportionment and the board of aldermen."[6]

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[4]Cedar Rapids Lumber Co. v. Fisher (May et al) 105 N. W. 595, 129 Iowa 332, 4 L. R. A. (N.S) 177.

[5]"Ultra vires" means, acts beyond the scope of authority.

[6]T. A. Clark Co. v. Board of Education of City of New York (1915) 142 N. Y. S. 106, 156 App. Dov. 842, 109 N. E. 1093, 215 N. Y. 646.

The acceptance of a bid does not constitute a contract. In Weitz v. Independent District of Des Moines, Weitz's bid was accepted and he was notified; later the board discovered another lower bidder was responsible and Weitz was prevented from fulfilling the contract. The law required letting to the lowest responsible bidder. A contract with Weitz, who was not the lowest responsible bidder would have been void.

> "If plaintiff was not the lowest bidder, and did not furnish the bonds required, the statute conferred no power upon the directors of the defendant to contract with the plaintiff. No contract existed for building the house, unless the written instrument had been executed."[7]

Another case Johnston Heating Co. v. Board of Education is similar to the above except that a contractor was notified by an unauthorized agent. The agent of the contractor submitted a bid for installing a heating and ventilating system. On the night of opening the bids, the board agreed to accept his bid if bonds were sold, this was the lowest bid and it was entered on the minutes of the board. Bellows, a board member was supposed to have notified the contractor's representative of the board's acceptance. At a subsequent meeting the board rescinded its acceptance. The question was, "Did the communication of the acceptance by Bellows constitute a contract and was the contractor's bid properly accepted?"

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[7] Weitz v. Independent District of Des Moines (Iowa 1890) Iowa 423, 44 N. W. 696.

> "In the absence of an authorized notice of acceptance of plaintiff's bid, the board had a perfect right to rescind its resolution accepting plaintiff's bid. The question of the legality of the boards action in accepting some other bid in place of plaintiff's is not now before the court. We simply decide that the board's action in revoking its acceptance of plaintiff's bid was quite within its legal right."[8]

Awarding Contract to Lowest Bidder. In general a school board is given wide discretion in awarding a school contract, but there are times when no discretion is allowed and the award to the lowest bidder is mandatory.[9]

Use of Shall Leaves No Room For Exercise of Discretion.[10] In New Jersey, Homan v. Board of Education, the statute provided "All contracts shall be awarded to the lowest responsible bidder." The board could not claim the date of completion as an excuse for the award to a higher bidder, just because the bidder had delayed the completion of prior contracts with the board. In Oklahoma the case Hannah v. Board of Education supports the same view even more emphatically. The Statute required letting to the lowest responsible bidder. The board awarded a contract for installation of a heating and ventilating system to the highest bidder and Homan who had the lowest bid brought an action for an injunction to prevent the execution of the contract. The court's comments were as follows:

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[8] Johnston Heating Co. v. Board of Education, Union Free School Dist. #6, Manhasset, Town of North Hempstead, Nassau County (1916) 161 N. Y. S. 867, 175 App. Div. 140.

[9] Briody v. DeKimpe (1917) 102 A. 688, 91 N. J. Law 206.

[10] Homan v. Board of Education of Camden, N. J. (1925) 127 A. 824.

> "The law requiring contracts to be let to the lowest responsible bidder is based upon public economy, and originated perhaps in distrust of public officers whose duty it is to make contracts. It is of great importance to taxpayers, and ought not to be frittered away with exceptions. Contracts made in violation of it have been held void and we think rightly." [11]

Board Cannot Pass Over Lower Bidder Without Substantial Reason. In another New Jersey case Jacobson v. Board of Education a contract for coal was awarded to the highest bidder. The board declared that the lowest bidder was not responsible but the second lowest bidder's responsibility was not attacked. The actions of the board aroused suspicions of fraudulent conduct. The contract it was held was not awarded in accordance with the requirements of the statute for the following reasons:

> "The board of education was aware of the fact that there were two bidders lower than the person to whom the contract was awarded, and they should have been prepared to state their reasons for passing over both of these bidders. Indeed they were bound to state some reason, and they only undertook it with reference to the prosecutors. Since the contract was not awarded in accordance with the requirements of the statute, it must be set aside."[12]

Lowest Bid Must Be Accepted When Board Shows Favoritism. Where, the statutes require school authorities to let construction contracts to the lowest bidder such authorities cannot by means of a provision in the notice for bids, arbitrarily

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[11] Hannan v. Board of Education of City of Lawton (1909) 107 P. 646, 25 Okl. 372, 30 L. R. A. (N. S.) 214.

[12] Jacobson et al v. Board of Education of City of Elizabeth et al (1906) 64 A. 609 (N. J.)

reserve the right to reject bids submitted. In Arensmeyer-Warnock-Zarndt v. Wray,[13] the board was forced to re-advertise because the first advertisement failed to specify wrought iron or steel. A contractor submitted the lowest bid on wrought iron pipes, in response to the second advertisement, but the board decided to reject all bids and advertise again, the third time. The evidence made it appear that the board deliberately attempted to reject the contractor's bid. Such a practice if permitted would lead to favoritism, corruption, extravagance, and improvidence in violation of the intention of the statutes, so a mandamus was granted to the plaintiff. It appeared as though the board was attempting to keep on re-advertising till a favorite firm happened to be the lowest bidder.

Award to Lowest Responsible Bidder is Mandatory Not Discretionary. In Pennsylvania to let a contract to the lowest responsible bidder is mandatory not discretionary. In Schuck v. School District,[14] the board voted to award a contract to the bidder who was fourth lowest, the board determined that the lowest bidder was not responsible but they did not investigate the responsibility of two other bidders.

A board must exercise sound discretion according to the standards fixed for the protection of the public and cannot act capriciously as if expending their private funds. An award must be made to the lowest responsible bidder after careful

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[13] Arensmeyer-Warnock-Zarndt, Inc. v. Wray et al Board of Ed. (1922) 194 N. Y. S. 398. 118 Misc. Re. 619.

[14] Schuck v. School District of Baldwin (1929) 296 Pa. 408, 146 A. 24

investigation of a bidder's financial standing, reputation, experience, resources, facilities, judgment and efficiency as builders.

Board Must Exercise Discretion. It is usually within the power of a school board or officers to exercise their discretion in determining the lowest responsible bidder, but cannot exercise such discretion to accomplish fraud.

Discretion as applied to public functionaries, means the power or right to act officially according to what appears just and proper...that is use "deliberate judgment." Officers prompted by a fraudulent purpose in awarding a contract cannot be said to be exercising discretion.[15]

If Boards Exercise Discretion They Cannot be Held Liable For Difference Between Bid Accepted and The Lowest Bid. In Stapleton v. Trussell, the school directors advertised for bids for the erection of a schoolhouse and accepted one, not the lowest. Action was brought by Trussell on behalf of the taxpayers to recover from the school directors the difference between the bid accepted and the lowest bid. It is alleged the district suffered a loss by not accepting the lowest bid. It was held that the statute did not arbitrarily require that the lowest bid be accepted.[16]

> "As specified in the law, their power in making such contracts is general, and in the absence of

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[15] School Dist. #2 of Silver Bow Co. v. Richards et al (1922) 205 P. 206. (Mont.) 62. 141.

[16] Stapleton v. Trussell, (1917) Texas 196 S. W. 269.

limitations they are required merely to act faithfully and in the exercise of their best judgment so as to best serve the interest of their district."

Acceptance of Higher Bid Not Invalid in Absence of Statute Where Board Uses Discretion. In Chandler v. Board of Education, it was alleged that the school board in rejecting Chandler's proposal was without any good, valid or legal reason, but that it was rejected arbitrarily, and without reason assigned therefor, and the action of the board in rejecting it and accepting another was invalid. No restraint is exercised to prevent the board from accepting a higher bid where the board reserved the right to reject any and all bids and there was no evidence of fraud on the part of the board and no statute requiring contracts to be awarded to the lowest bidder.

"The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public, and not of the bidders." [17]

A board of education is not required to accept the lowest or any bid where it reserves the right to reject any and all bids, and no mandamus will be issued compelling them to do so as so well expressed in the following case of Anderson v. Board of Education, where the contract was awarded to another, though Anderson's bid was the lowest. It was held that the board merely solicited for proposals and the reason for the rejection of plaintiff's bid was immaterial.

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[17] Chandler v. Board of Education of City of Detroit (1895) 104 Mich. 292, 62 N. W. 370.

"As such it did not lay the foundation of a contract. The plaintiff's bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject. No claim is advanced in the petition looking to a recovery for fraud or deceit in making the proposals for bids. It is, indeed, asserted that the defendant rejected the plaintiff's bid "without cause, arbitrarily and capriciously, through favoritism and bias." But, if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiff's because of the motive which let to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or without any assignable cause." [18]

It is Not Always Necessary to Accept Lowest Bid. In Kemp v. Sedalia, Kemp was awarded the contract to do some cement work, he began work and was then notified that his contract would be rescinded. This was done and Kemp was prevented from completing the contract. The work was then let to another whose bid was lower but forgotten and overlooked when the contract was let.

A school district cannot escape liability of a contract because of the neglect of one of its agents at the time of letting, in not presenting a lower bid, since a board can legally make a contract even though a lower bid has been before it.

"This only leaves the question whether defendant can on account of the neglect of one of its agents, annul, at its own will, a contract which it was authorized to make with another who was innocent of all fault, and escape a liability in damages. We think it cannot. This contract was one it could

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[18] Anderson v. Board of Education (Mo. 1894) 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

legally make and even though the other bid had not been forgotten and was lower than plaintiff's, still the board may have many proper considerations for referring plaintiff's bid."[19]

Responsible Bidder Means More Than Financially Responsible. The term "responsible" as applied in "lowest responsible bidder," means more than mere financial responsibility but includes integrity, skill, ability, and capacity to perform that particular work.[20] To determine the responsibility of a bidder the board of education should investigate the bidders to learn of their financial standing, reputation, experience, resources, facilities, judgment and efficiency as builders.[21]

It is usually within the power of a school board or officers to exercise their discretion in determining the lowest responsible bidder and their judgment is final.[22] The determination of the body authorized to accept bids upon proper proceedings that a bidder is not responsible is final, and will not be disturbed unless it appears that the action was in bad faith, or that the proofs were such as to satisfy reasonable men of the bidder's responsibility.

In the exercise of discretion the board of education, in the absence of statutes, may award a contract notwithstanding the bid is not the lowest.[23] In Bowers v. School Board[24] a school

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[19] Kemp v. School District of City of Sedalia (1900) 84 Mo. App. 680.

[20] Ellingson v. Cherry Lake School District (1927) 212 N.W. 773.

[21] Hibbs et al v. Arensberg et al (1923) 119 A. 727, 276 Pa. 24

[22] Schwitzer v. Board of Education of City of Newark (1910) 75 A. 447.

[23] Goss v. Board of Education of City of Chicago (1928) 247 Ill. App. 58.

[24] Bowers v. School Board (Pa. 1875) 2 pears. 227.

board promised to award a contract for the erection of a schoolhouse to the lowest bidder, but gave the contract to one whose bid they considered the best. Bowers claiming to be the lowest bidder was not entitled to an injunction restraining the board from awarding the contract as stated in the absence of proof of corruption or bad faith.

CHAPTER VII

JUDICIAL ORDERS ON ACCEPTING BIDS

Injunctions. An injunction is a judicial order prohibiting something, an action brought to restrain, enjoin or prevent the performance of some act or the execution of a contract.

Ordinarily, any taxpayer in the school district may seek an injunction and challenge the validity of an alleged illegal contract, and it will invariably be granted where there is proof of fraud or violation of the statutes.

Prima Facie Evidence of Fraud Sufficient For an Injunction. In School District #2 of Silver Bow Co. v. Richards,[1] the evidence showed a prima facie[2] case of fraud. The majority of the board did not exercise deliberate judgment and discretion, but were prompted by a fraudulent purpose. Richards and Chinn two board members met with an agent of the Connell Co., and assumed to enter into a contract for a piano, victrola, needles and records for $663.45. The instruments were delivered. There had been no meeting of the board and no bids had been called for. The plaintiff, the third member of the board, protested and bids were called for. As a results two other companies submitted lower bids, but Richards and Chinn voted to award the contract to Connell Co. Evidence showed that Richards and Chinn gave no consideration to bids other than that of the Connell Co.

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[1] School Dist. #2 of Silver Bow Co. v. Richards et al (1922) 205 P. 206 (Mont.)

[2] Prima facie-means at first view or appearance of business.

The piano and victrola were of inferior quality and not worth the purchase price. The evidence showed a prima facie case of fraud. The majority of the board, it was held, did not exercise deliberate judgment and discretion but were prompted by a fraudulent purpose.

Violation of Statute Sufficient for an Injunction. When the statute requires that the award of a contract shall be to the lowest responsible bidder and if the board proceeds to award a contract in direct violation thereof, an injunction will be granted. When there is an attempt to change the plans and specifications[3] or the plans are indefinite for competitive bidding on a common basis, an injunction will be granted to prevent the execution of an illegal contract.

In Hannan v. Board of Education,[4] Hannan a contractor, submitted the lowest bid for the installation of a heating and ventilating system and the board proceeded to award contract in violation of the statutes to a higher bidder. Action was brought to restrain the execution of the contract. It was held that the purpose of awarding to the lowest responsible bidder is to secure economy and guard against collusive contracts or favoritism. An injunction was granted.

Alterations Sufficient Cause for an Injunction. In Lehigh Coal & Navigation Co. v. Summit Hill School District,[5]

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[3] Scola v. Board of Education of Town of Montclair (1908) 71 A. 899, 77 N. J. Laws 73.
Edmundson v. Board of Education of School District of City of Pittsburgh (1915) 94 A. 248 Pa. 559.

[4] Hannan v. Board of Education of City of Lawton (1909) 107 P. 646, 25 Okl. 372, 30 L. R. A. (N.S.) 214.

[5] Lehigh Coal & Navigation Co. v. Summit Hill School District (1927) 137 A. 140, 289 Pa. 75.

the board advertised for bids for the erection of a school building and the contract was not let to the lowest bidder. Changes were made so as not to comply with the specifications of the advertisement, by eliminating the requirement that a contractor maintain workmen's compensation insurance, and the surety bond was modified by substituting an individual surety. This was in direct violation of the statute and the contract was declared void.

Lack of Discretion Sufficient For Injunction. A board of education must give reasons for passing over lower bidders. To award a contract to a higher bidder not in accordance with the statutory requirements renders a contract void and it must be set aside.[6]

No Common Basis For Bidding Sufficient For an Injunction. An injunction will be granted, if there is no common basis for competitive bidding, such as an advertisement failing to state the date of completion or an architect failing to provide a sufficient number of copies of plans and specifications for all those who express a wish to bid.[7]

Acceptance of an Illegal Bid Cause for Injunction. If the date of completion of a contract is extended a contract is invalid and an injunction will prevent the entering.[8] If the award of a contract is based upon an illegal bid such as

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[6]Jacobson et al v. Board of Education of City of Elizabeth et al (1906) 64 A. 609. (N. J.)

[7]Hibbs et al v. Arensberg et al (1923) 119 A. 727, 276 Pa. 24.

[8]Mulcahy v. Board of Education (1928) 159 N. E. 324, 250 Ohio App. 492.

one received subsequently to the closing date, as is illustrated by the case State of Nebraska v. Commissioner of York County,[9] a bid submitted was not only illegal because of being filed late but also because the bid quoted the price "at just what it costs to lay them down."

Injunction Will Not be Granted When Award is Legal. An injunction will not lie to restrain a school board from awarding a contract to one who is not the lowest bidder where a board reserves the right to reject any and all bids, and there is no evidence of fraud on the part of a board, and no statute requiring contracts to be awarded to the lowest bidder.[10] Neither will an injunction be granted if a bid is the lowest in the aggregate and a board in its discretion accepts it.[11]

Taxpayers Must Exercise Due Diligence to Obtain an Injunction. The right to obtain an injunction to prevent an illegal expenditure of school funds will not be granted if accusers do not use due diligence in bringing a suit and are guilty of laches.[12] In Connors v. City of Lowell,[13] the taxpayers two years and seven months after the completion of a building attempted to restrain payment on an ultra vires contract which

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[10] Chandler v. Board of Education of City of Detroit (1895) 104 Mich. 292, 62 N. W. 370.

[11] Gilbert v. Board of Education (1901) 21 Ohio Cir. St. R. 416, 11 O. C. D. 552.

[12] 'Laches' means not taking action at opportune time.

[13] Connors v. City of Lowell (1923) 140 N. E. 742, 246 Mass. 279

had been entered into without legally advertising for bids and upon modified terms and specifications. Because of this delay in bringing an action the taxpayers showed a lack of due diligence so an injunction was denied.

Injunction Will Not Lie When Board Exercises Discretion. No injunction will be granted where an award of a contract substantially complies with the statutes and a board has exercised discretion when there is any doubt as to the interpretation of the law.[14]

Injunction Will Prevent Evasion of the Law. When it can be shown in awarding contracts that there is an intention to avoid the statute an injunction will be granted to prevent the execution of such illegal contracts. The board of education in In Re Summit Hill Directors[15] directed work to be done and then several separate bills were rendered each under $300, so as to evade the law requiring all expenditures involving $300 or over to be submitted to competitive bidding. The statute in Pennsylvania is mandatory and school officers cannot deliberately disregard the requirement that contracts over $300 be awarded to the lowest and best bidder.

Errors in Bid. As a general rule when a mistake is made in a bid the treatment depends upon its importance. If the error was not incidental but fundamental and a substantial

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[14]Gilbert v. Board of Education (1901) 21 Ohio Cir. St. R. 416, 11 O. C. D. 552.

[15]Summit Hill Directors, In Re (1917) 102 A. 278, 258 Pa. 575.

part of the whole consideration of the contract, upon settlement of actual damages sustained the parties can be put in "status quo"[16] not meaning that one shall profit out of the mistake of another. Insignificant errors of little importance that any reasonable person might make are disregarded.

Payment of Re-Advertising Will Put Parties in Status Quo. In Kutsche v. Ford,[17] Kutsche submitted the lowest bid for the erection of a new school building and a letter was mailed to him notifying him of the fact that he was awarded the contract. Kutsche noted the omission of his cost of plastering which amounted to $6,400 so he telephoned to the architect and told him of the error. Kutsche wrote a letter to the clerk of the school board and left it with his housekeeper, but it was never delivered. The board met the following week, cashed the check of $3,200 and advertised for new bids. The refusal of Kutsche to enter the contract made the new bid necessary. It was held that a mistake of $6,400 was fundamental and the plaintiff should have relief. Likewise in Board of Regents of Murray State Normal School v. Cole, where Cole's bid being the lowest was accepted and several hours later he discovered an error in his figures in omitting $22,000 for cut stone. He declined to execute the contract and secure a bond. The board forfeited the check and advertised for a second letting. Cole was again successful bidder. He was awarded the contract and

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[16] "Status quo" means as it was.

[17] Kutsche v. Ford et al (1923) 192 N. W. 714, 222 Mich. 442.

work was commenced. The failure to execute the first contract entailed some additional expense, so action was brought. Here it was held as in the previous case that the mistake was not incidental and fundamental and a substantial part of the whole consideration of the contract. Upon payment of $200 actual damages the parties can be put in status quo.

> "There is no doubt that appellee made an honest mistake in his bid, and it does not appear that he was guilty of culpable negligence. It was such an error as any business man might make. The only way in which appellant has been prejudiced is in the cost incident to the second letting. Upon payment of this leg appelle (Cole) the parties may be placed in status quo and all the conditions of the rule of the cancellation of the instrument fairly met."[18]

An Error Corrected Before Bids Are Opened is not Illegal. In another case involving an error in a bid submitted, Zimmerman v. Miller,[19] Zimmerman discovered his error before the date set for opening bids, and he sent in a corrected bid before the bids were opened. This correction of his former bid made his $900 lower than the next bidder to whom the contract was awarded. The board refused to accept the corrected bid on the grounds that it constituted an illegal bid, received late and not accompanied by a certified check. Here the board used discretion. There is no doubt but what the board made a mistake in determining the legality of the corrected bid, and the grounds for letting the contract to a higher bidder.

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[18] Board of Regents of Murray State Normal School v. Cole. (1925) 273 S. W. 508, 209, Ky. 761.

[19] Zimmerman v. Miller (1912) 85 A. 871, 237 Pa. 616.

There was nothing further the plaintiff could do as a mandamus could not be granted compelling acceptance of his bid when the board had exercised discretion.

Deposit Forfeited if Error Cannot be Adjusted and Bidder Refuses Proposition. However, there are two cases on record where the deposits were forfeited; one in which the bidder refused to enter contract and enter contract and the other because of laches. In Independent School District #102 v. Farmer's & Merchants State Bank,[20] McAdams was the lowest bidder on a new school house to be erected. He notified the board of an error of $1200 in his bid. He refused to sign or execute the contract or file a surety bond. He made an effort to adjust the error, so the board offered the proposition of an extension of time and an additional payment of $1,200. The surety company knowing that this would be an illegal contract refused to issue a bond, so McAdams tried to dispose of the entire affair by asking for the return of this deposit which the board declined to do. The bank refused payment so the board re-advertised for bids and brought an action to recover on the check. Held that there was no abandonment of contract by mutual agreement. The board did attempt to relieve the situation but McAdams failed to comply with the conditions. The check is a part of the bid, to be forfeited if the successful bidder failed or refused to enter into a contract on acceptance of his offer.

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[20] Independence School Dist. #102 of Pennington County v. Farmer's & Merchants State Bank of Thief River Falls. (1922) 190 N. W. 539, 153 Minn. 353.

Deposit Forfeited Upon Unreasonable Delay. In Federal Contracting Co. v. City of St. Paul,[21] the contractor brought an action to recover $4,500 deposited with his bid for the construction of a schoolhouse. He was unable to get bond upon the acceptance of his bid which was the lowest because the bonding company thought his bid was too low. Nearly three years later the contractor discovered an error of $17,941.70 in his bid and claimed relief upon the forfeiture of his deposit. It was held that a contractor's bid for construction of a school building and its acceptance constituted a preliminary contract which contemplated a later formal contract. A contractor discovering a mistake in a bid three years thereafter was not entitled to relief against forfeiture of the deposit. "Promptness is a suggested condition of relief. Good policy requires it."

Contract Not Invalid Because of Trivial Error. If an error is an omission of so trivial an amount that it is incidental the error cannot be sufficient grounds to invalidate a bid otherwise in proper form. In Nebraska there was a case of this nature where the bids were submitted to furnish officers with supplies containing books, blanks and stationery and miscellaneous articles. Whedon in this case submitted a bid including all the articles advertised for except one knife, eraser and a bottle of ink, otherwise the bid was

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[21] Federal Contracting Co. v. City of St. Paul (1929) 225 N. W. 149, 177 Minn. 329.

proper and was the lowest legal bid.[22]

Mandamus. A mandamus is a judicial order commanding an official to perform a specified act,[23] such as to sign a contract,[24] award a contract,[25] approve a bill or warrant.[26][27]

Mandamus Granted When Statute is Mandatory. When the statute provides that "All contracts shall be awarded to the lowest responsible bidder," the lowest responsible bidder is entitled to the contract, notwithstanding delays in completing prior contracts; in Homan v. Board of Education,[28] this was no legal excuse for not complying with the plain mandate of the statute.

A board of education cannot deliberately reject bids and re-advertise but must award contract to the lowest responsible bidder.[29] Payment of a bill cannot be refused when all legal requirements of advertising for bids have been met and those contracting have acted within their authority.[30]

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[22] State of Nebraska ex rel Whedon v. Com'rs York County (1882) 13 Neb. 57, 12 N. W. 816.

[23] Temple v. State (1916) 113 N. E. 233, 185 Ind. 139.

[24] Lincoln School Tp. of Hendricks County v. Union Trust Co. (1905) 74 N. E. 272, 36 Ind. App. 113.

[25] State v. York County Com'rs (Neb. 1882) 13 Neb. 57, 12 N. W. 816.

[26] Smith v. State Board of Control (1932) Calif. 10 P. (2d)736.

[27] Harris v. Cooley (Calif. 1915) 152 P. 300, 171 Calif. 144. In re Randolph McNutt Co. (1931) 247 N. Y. S. 539, 232 App. Div. 721.

[28] Homan v. Board of Education of Camden (1925) 127 A. 824.

[29] Arensmeyer-Warnock-Zarndt, Inc. v. Wray (1922) 194 N. Y. S. 798, 198 App. Div. 476.

[30] Smith v. State Board of Control (1932) Calif. 10 P. (2d) 736.

In Nebraska, a writ of mandamus was issued to compel an acceptance of a bid that had been rejected because of the omission of two articles of insignificant value which did not invalidate the bid, and to reject a bid filed subsequent to closing date containing an indefinite price stated "at what it costs to lay them down."[31]

A court will also grant a mandamus to compel a board of education to accept bids from all who desire when there is an unlawful attempt to restrict the number of competitors. To indulge in a practice of eliminating inexperienced and financially irrespondent bidders before receiving bids destroys the intention of the statutes concerning competitive bidding, however, praiseworthy the motives might be.[32]

Mandamus Will Not Lie to Execute Illegal Contract. In Hill v. American Book Co., Hill, the Superintendent of Public Instruction, and Secretary of the Textbook Commission, refused to sign a contract awarded by the textbook commission because the American Book Company added the cost of establishing a central depository to the retail price charged for the books. This was not done by any of the other companies. Hence a mandamus was held not to lie to compel the Superintendent of Public Instruction to execute the contract for the following reasons:

"The statute was passed for the benefit of people

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[31] State v. York County Com'rs (Neb. 1882) 13 Neb. 57, 12 N. W. 816.

[32] J. Weinstein Bldg. Corp v. Scoville (1932) 254 N. Y. S. 384, 141 Misc. Rep. 902.

> and its main object was to furnish textbooks at the lowest cost. The cost of the central depository should be paid by the publisher or contractor and should not be passed on to the users of the books in the public schools." 33

Warrant Must be Issued in Payment of Legal Contract. In Re Randolph McNutt Co., an action was brought for a peremptory mandamus order directed to the comptroller of the city of Buffalo requiring him to countersign a warrant for money due on goods furnished the board of education.. Refusal to sign was based upon the allegation that the specifications were manipulated to shut out competitive bidding and showed favoritism and that specifications failed to designate quantities of particular furniture desired and time of delivery. Held:

> "The city comptroller had no authority to re-audit the claim of petitioner, the claim having been properly audited by the board of education and the supplies having been brought for use in the public schools of the city and sufficient funds being on deposit with which to pay the bill." 34

Mandamus Will Not Support an Illegal Act. A mandamus will not be granted to compel the award of an illegal contract, based on an illegal bid nor to the lowest bidder where an attempt was made later to award on an illegal bid, nor where the board has the discretion to reject any and all bids. 35

Mandamus Will Not Compel Payment of Warrants Given on Contracts Over $500. A board may not enter small contracts to

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34 In Re Randolph McNutt Co. (1931) 247 N. Y. S. 539, 232, App. Div. 721.

35 State v. Cincinnati Board of Education (1905) 27 Ohio Cir. St. R. 832.
State v. Board of Education (1905) 27 Ohio Cir. St. R. 832.

evade the statute but if the jobs are distinctly separate and planned at different times, they are not illegal even though the sum total of all the jobs amounts to more than limit set by the statute.

There is a 1934 case in California bearing upon this question which is given in quite detail because of its recency. In Brown v. Bozeman the board of education undertook to make some improvements as follows: built movable bleachers for indoor baseball building, reconstructed floor and walls of handball court, erected new posts and backstops for the basketball courts, built four tennis courts, beautified the grounds with shrubs and plants, installed water pipes, grounds leveled and installed flood-lights for ball grounds and other courts. The trustees did not advertise for bids. The total cost of all these improvements was $8,714.13. Warrants were issued for the payment of improvements none were over $500. It is alleged that work was done in violation of the statute requiring advertising for bids. The defense claims that each improvement was a separate and distinct undertaking and did not require advertising for bids. Action was brought to compel the payment of the warrants.

It was held, where the total cost of labor and materials used in a particular "job" for school purposes exceeds $500 a school board must advertise for bids; "jobs" being piece of work done or to be done as a whole.

"It should be impossible to segregate the items of the various accounts so that the cost of each "job" could be show. If this be done, the trial court should order respondent Bozeman to approve such portions of the warrants involved in this action as are shown to have been for labor or materials used on any of the "jobs" not costing in excess of $500., and the respondent Rea to approve, allow, sign, and order the same paid. There is no good reason why any portion of any bill of a materialman such as the bill for the manual training department and other school supplies should not be paid if it be shown that such bill was legally contracted."[36]

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[36] Brown v. Bozeman (Calif. 1934) 32 P. (2d) 168, 138 Cal. App. 133.

CHAPTER VIII

COURT ADJUSTMENTS OF ILLEGAL CONTRACTS

Whenever an illegal contract has been entered into invariably someone is goind to object and inevitably it will be left to the courts to settle. Of course a prevention is better than a cure and it is advisable that those in public office who have the authority to make contracts should be informed on the legal steps involved. It is especially advisable for school directors to know the statutes of one's own state governing the awarding of school contracts if litigation is to be avoided.

Not only should public officers be intelligently informed in the legal steps involved in discharging the duties intrusted to them, but every spirited citizen should know the limitations of the authority of school officials, and be a check upon them.

Taxpayer Must Not Delay Action to Prevent an Illegal Expenditure. The first case in mind is an action brought by ten taxpayers over two years after the execution of a contract to restrain an alleged illegal expenditure pertaining thereto. The description of this case is as follows: Walker was awarded a contract for the construction of a high school building by the building commission after rejecting the single bid which was made by Walker, received pursuant to the advertisement in a newspaper and without re-advertising for bids and without notice to the public of any change in the specifications. The contract was awarded upon terms differing in important

particulars from those on which the public bids were invited. Connors, a taxpayer and bidder, objected to the award of this illegal contract in a letter to the chairman of the commission. Nothing was done to prevent the execution of it. The building had been completed for over two years and seven months when this suit was filed. There seems to be no question that this was an ultra vires contract and that one contracting with the building commission is bound by the limitations of the statute, but our taxpayers in this case delayed too long to prevent an illegal expenditure of the atxpayers' funds. It is quite essential then that an action to prevent a wrong must be exercised at the critical time if any benefit will come of it. "The plaintiffs did not use due diligence in bringing this suit and are guilty of laches."

> "There was a delay of more than two years and seven months on the part of Conner's after his letter to the chairman of the Commission asserting the illegality of the contract before filing of the bill in the present suit. The plaintiffs did not use due diligence in bringing this suit and are guilty of laches."[1]

Contractors Cannot Collect on Executed Contracts That are Illegal. Contracts awarded in violation of the statutes are known as ultra vires, acts beyond the scope of authority. As a general rule a contractor cannot collect payment on an illegal contract regardless of the fact that the contract has been executed and he is out his time, labor and materials.

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[1]Connors v. City of Lowell (1923) 140 N. E. 742, 246 Mass. 279.

Contractor Cannot Collect for Plastering When Contract Was not Awarded on Competitive Bidding. There are three cases where illegal contracts were executed and the courts held to the same opinion. A contractor cannot collect for work done on an ultra vires contract. In Reams v. Cooley[2], Reams built a schoolhouse and executed a separate contract for the plastering which was not included in the construction contract nor advertised for competitive bidding. The superintendent of schools refused to approve a warrant of $531 in payment for the plastering. The statute specifies the limitations upon a board and even though it may work hardships upon individuals where the work and material has been furnished, nevertheless he is considered a mere volunteer and suffers only what he ought to have anticipated.

If Acceptance of Bid is Not in Writing Contractor Cannot Collect for Work Done. In Metz v. Warwick[3], there was no written contract nor written notice of acceptance of Warwick's bid. Warwick bought materials from Metz in repairing and building an addition to a schoolhouse for which he did not pay, so an attempt was made to collect from the surety of the bond. Here it was held that the contract was ad initio and had no validity. The surities could not be bound to guarantee the performance of a contract that did not exist.

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[2]Reams v. Cooley (Calif. 1915) 152 P. 293, 171 Calif. 150, Ann. Cas. 1917 A.

[3]Metz v. Warrick (1925) 269 S. W. 626, 217 Mo. App. 504.

Collection Cannot be Made For Work Done on Altered Bid. A contractor cannot collect upon a contract where he was allowed to amend and increase his bid after it had been opened, on account of an alleged mistake which did not appear on the face of the original bid. He though that the scale was one-fourth inch equal to one foot, instead of one-eighth inch. His bid was the lowest and was accepted. After discovering his error, he raised his bid and was still the lowest bidder. He entered a contract which was fulfilled and did extra work besides. He was paid some and then sued for the balance. It was held, that the contract was illegal and he could not collect even though the work has been done.

> "While the rule may work hardship in particular instances or cases, no other rule would subserve the public welfare, and to hold otherwise would practically nullify this and similar statutes."[4]

Alteration of Bids Does Not Excuse Payment For a Reasonable Value. If a contract has been executed after changes, alterations and omissions have been made to reduce the cost, leaving the plan substantially the same and the parties have acted in good faith by making reasonable deductions and additions accordingly, common honesty requires that the reasonable value thereof be paid, and such changes would not be ultra vires of a board.

In the Washington case Criswell v. Board of Education, the board of education advertised for bids for the erection of

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[4] McGreevey v. Board of Education (1900) 20 Ohio Cir. Ct. 114, 100 C. D. 724.

a schoolhouse according to certain specifications. After opening bids, the plans were changed to reduce the cost of the building. The architect estimated that a saving of $6,230 could be made by modifying the plans. This amount was deducted from the bid of Grant who had the lowest bid and the contract was awarded to him for $6,230 less than his bid with the understanding that the schoolhouse was to be built according to the modified plans.

During the progress of construction the district decided to change the plans for the heating plant and deemed it advisable to install a more expensive one thus allowing $1,500. The board ordered extra work to be done on the foundation for which $892.50 was allowed. In addition to these changes the contractor made numerous minor changes in the course of construction such as substituting cheaper and inferior materials, without the knowledge or authority of the board. These changes were estimated to amount to about $1200 in favor of the contractor.

The question arose contesting the legality of this contract and action was brought to stop the payment of the warrants issued in payment of this contract.

The reasonable value of the completed building was estimated to be $20,535.56. Should payment be made to Grant when he and the architects who were agents of the board collusively and fraudulently changed the plans and specifications and substituted inferior materials in the course of construction in order to obtain an excessive and dishonest profit? The court evidently

believed that common honesty required the payment of the reasonable value of the building in spite of the alterations, changes and modifications, and gave the following reasons:

> "Where the plan remains substantially the same and the parties act in good faith, detail features, which are not necessary to the building, and which do not change the substantial character of it, may be eliminated on terms agreeable to the board and the bidder entitled to the contract upon the plans as advertised. Where a proper deduction from his bid is made an account thereof, such a change in the specifications would not be ultra vires of the board. There is no evidence of any bad faith on the part of the board or the defendent Grant in this respect."[5]

Board Members May be Dismissed for Misconduct. Whenever school officers make an illegal expenditure, any taxpayer within the district may protest; it is within his rights and upon proof of corruption, favoritism, fraud or incompetence the member may be discharged. If more taxpayers would see that board members acted within the statutes, maybe we would soon have better qualified men in such offices, without the necessity of legislation.

There are several cases where the courts have stepped in and dismissed board members from office for the exercise of bad faith in the discharge of their duties.

In School Dist. #2 v. Richards,[6] the piano and victrola case cited in Chapter VII, two board members Richards and Chinn were dismissed from office because of prima facie evidence of fraud. They did not exercise deliverate judgment

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[5] Criswell v. Board of Directors of Everett School Dist. No. 24 (1904) 75 P. 984, 34 Wash. 420.

[6] School District #2 of Silver Bow Co. v. Richards et al (1922) 205 P. 206 Mont.

and discretion, but were prompted by a fraudulent purpose. Connell, the third member of the board, who brought the case into court to prevent this illegal expenditure deserves a word of praise. He is more of the type of a board member we desire and respect. Honesty and good judgment are qualities we should demand of all public officers.

In the case In Re Summit Hill Directors' Removal evidence did not necessarily prove that the officers committed fraud but they acted capriciously and without reason in refusing to let the contract to the lowest bidder. This was a direct violation of the statute. They tried to evade the statute by breaking up the contract in small parts with the intention of evading the law. This lack of deliberate judgment was sufficient cause for their dismissal.

> "The use of the word "shall" leaves no room for the exercise of either option or discretion on the part of the board, in so far as contracts exceeding the amount stated are concerned."[7]

School directors cannot deliberately make contracts involving amounts below statutory limit for the purpose of evading statutory requirements, to do so is just cause for removal.[8]

There are times when a school board may believe that they have authority to enter a contract and go ahead in violation

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[7] In Re Summit Hill School Directors' Removal (1927) 137 A. 143, 289 Pa. 82.

[8] In Re Chester School Districts Audit (1930) 151 A. 801, 301 Pa. 203.

of a by-law that the school board has adopted. Any contract awarded in violation of such a by-law is void.

> "Persons dealing with a municipal corporation are bound at their peril to know that the contracts made by the officials of such corporation are made in the mode pointed out by the charter and ordinances, and if they fail, they must suffer the consequences. The public interest demands, aside from any private considerations, that we should hold that this by-law was mandatory in its nature, and compliance with it indespensable to the validity of any contract coming within its reach."[9]

All contracts made in violation of a statute are void: The statute must be substantially followed:

> "The statute must be substantially followed. If the board could dispense with others, and thus be left with no guide except its absolute will. The board is the agent of the public and intrusted with the duty of carrying out the mandates of the law in the matter of adopting textbooks for use of the children of the public schools."[10]

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[9] Montenegro-Riehm Music Co. v. Board of Education of Louisville (1912) 145 S. W. 740, 147 Ky. 720.

[10] Green v. Board of Education of City and County of San Francisco (1900) 63 P. 161, 131 Calif. 165.

CHAPTER IX

SUMMARY

Advertising for Bids. Statutes vary in length of time required for notices, see statutory requirements of your own state.

In general the advertising is done in the official county newspaper or by posting a notice in the three most public and conspicuous places.

The notice of, or advertisement for bids must be clear and definite to permit competitive bidding on a common basis and meet statutory requirements.

Advertisement must contain all of the essential elements necessary for computation of bids upon a common basis.

Statutory duty cannot be delegated by a school board, but a committee may do the ministerial work if it is subsequently ratified by the board.

A contract is void if awarded in violation of a statute requiring advertising.

If a board advertises for bids when no statute requires them to do so, they may act independently of the advertisement provided they act in good faith and with reasonable discretion.

Re-advertisement is necessary where the contract is changed or altered from plans and specifications in the notice.

Contents of the Bid. A bid must conform to specifications.

A contractor cannot change his bid after they have been opened.

An increase in the amount of a bid which has been accepted even with the consent of the school authorities is illegal.

The deposit accompanying a bid is a guarantee of good faith and is for a penalty and not for a liquidated damages.

A corrected bid is valid if corrected before opening date.

Awarding the Contract. Where the notice reserves the right to reject any and all bids, they may re-advertise for bids.

A notice of acceptance of a bid must be communicated to the contractor by an authorized agent of the board.

Where the statute requires contracts to be let to the lowest bidder, authorities cannot arbitrarily reject the bids submitted.

A board must investigate the responsibility of bidders.

An award to a bidder not the lowest, cannot be made capriciously, and without reason.

A board must be prepared to show sufficient reason why the job was not given to the lowest bidder.

The term 'responsible' is construed to include, integrity, skill, ability, and capacity to perform that particular work, character, responsibility, competency , reputation, experience, efficiency, facilities, resources, financial standing, judgment and the prices.

The determination of the lowest responsible bidder by the authorities empowered to do so is final, and unless made in bad faith or arbitrarily or to accomplish fraud or favoritism, such judgment must satisfy reasonable men.

Where a successful bidder refuses to enter a contract, a board cannot let contract to a non-bidder, must re-advertise.

Adjustments of a Contract. An award of a contract on a bid received after the expiration of the time specified in the notice or advertisement is invalid.

Notice of a board meeting at which bids are to be considered must be given to all who are to act on the bids.

The cancellation of a contract is justified by a fundamental mistake in the bid, and the contractor is entitled to the return of the deposit.

The deposit is not forfeited upon an illegal attempt to increase the amount of a bid after acceptance by the school authorities but a board must give a bidder a chance to refuse to contract before forfeiture occurs.

To let contracts in violation of the statutes renders contract void.

Contractors should be familar with the limitations of school authorities.

Personal Comments and Recommendations. The individual elected to public office should be competent, honest, and impartial. They should at all times place duty and the welfare

of the community above individual feelings. In order to carry out the duties imposed upon them, only the best qualified individuals should be slected to be on a school board.

There have been many proposals for improving the administrative system of our schools but very few states have gone beyond the stage that has always existed in respect to the qualification of board members.

In North Dakota the statute, Sec. 1153 of the General School Laws prescribed the qualifications of a school officer as follows:

> "At any election of school officers in any school district in this state all persons who are qualified electors under the general laws of the state and all women twenty-one years of age having the necessary qualifications as to citizenship and residence required of male voters by law, shall be qualified voters and shall be eligible to the office of county superintendent of schools, school director, district treasurer, school district clerk, or member of the board of education, or may be judge or clerk of such election; provided, however, that the county superintendent shall possess the educational qualifications named in section 1122."

Note the only qualification required is, that he must be a qualified voter. In other words to be a board member one need not have attended one day of school in the United States, not even have finished the first grade; no educational qualifications whatever. Is it any wonder that we have so many grossly incompetent and corrupt individuals holding public office to whom we intrust the spending of our public funds raised by taxation?

Maybe there is just cause for the complaint about high taxes, but how are we attempting to remedy the situation?

Why don't we start at the point where our efforts may do the most good? Too often we overlook the mismanagement of our board directors and think only of the salaries paid our teachers. If only we would curtail the expenditures of school districts that have been made through fraud, corruption, favoritism and lack of judgment maybe there wouldn't be quite so much of a tax burden we hear so much about.

It is the purpose of this chapter to encourage voters and taxpayers to give a little more thought in their selection of public officers; to encourage the selection of the best prepared and qualified individuals in their district for board members. Some of the questions that should be asked about every candidate for office are:

What are his educational qualifications? Is he honest? Has he a good reputation? What are his ideals? Does he use good judgment? What success has he made in business? Will he discharge the duties of his office to support the American ideals of education?

The writer suggests that further study be made to determine the relationship between the systems of administration in the various states and the court decisions on bids. Some states have county boards of education or the county superintendent to approve the awarding of all contracts. An investigation may be able to discover advantages of county boards over the enactment of statutes governing bid procedure.

Another interesting investigation might be made to study

the qualifications of board members in all of the cases studied to determine the advisability of prescribing specific educational qualifications for school officers. The writer is of the opinion that the requirement of the completion of the eighth grade in the United States is advisable before anyone be permitted to hold a public office.

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